

-WSS Document 99

DEATH PENALTY

FILED

JAN 8 5 2009

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____ DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, WACO DIVISION

RAMIRO RUBI IBARRA	§	
Petitioner,	§	
vs.	§	HABEAS CORPUS
NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Institutional Division	§	NO. 02-CV-52
Respondent.	§	

**PETITION FOR WRIT OF HABEAS CORPUS
THIS IS A CAPITAL CASE**

Russell D. Hunt, Jr.,
Attorney for Petitioner
811 Nueces Street
Austin, Texas 78701
(512) 930-0860
(512) 473-8804 - Facsimile
Texas State Bar # 00790937

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
PROCEDURAL HISTORY.....	1
STATEMENT OF FACTS.....	4
SUMMARY OF CLAIMS FOR RELIEF.....	11
1. <i>Ex post facto</i> and Due process violations:	11
2. Sixth Amendment right to speedy trial and effective assistance of counsel, Eighth Amendment's prohibition on cruel and unusual punishment, Fourteenth Amendment due process violations.....	12
3. Impermissible search and seizure violating the Fourth Amendment.....	13
4. Unduly suggestive identification procedures.....	14
5. Admission of testimony regarding decedent's fear of Petitioner.....	15
6. Admission of testimony regarding Petitioner's reputation for sexually inappropriate behavior.....	15
7. Article 37.071, Tex. Code Cr. Proc., as applied by Texas Courts, is unconstitutional because it does not provide for meaningful appellate review	15
8. Ineffective Assistance of Counsel.....	16
9. Mr. Ibarra's execution would violate the Eighth Amendment's Prohibition against the execution of individuals with mental retardation.....	16
10. The Texas Sentencing Scheme violates the Sixth Amendment by not requiring a jury to determine an essential factual element to the offense of capital murder.....	17
11. Violation of Vienna Convention on Consular Relations.....	17
ARGUMENT AND AUTHORITIES.....	17
Point of Error Number One.....	17
Point of Error Number Two.....	22
Speedy Trial.....	24
Cruel and Unusual Punishment.....	28
Point of Error Number Three.....	29
The trial court erred in denying Petitioner's Motion to Suppress.....	29
Probable Cause is Required for Valid Arrest.....	30
There Were No Exigent Circumstances to Justify the Arrest.....	32
Point of Error Number Four.....	33
The trial court erred in refusing to exclude identification testimony.....	33
Due Process.....	35
Confrontation.....	38

Point of Error Number Five.....	39
Admission of testimony regarding decedent's fear of Petitioner.....	39
Harm.....	42
Point of Error Number Six.....	43
The trial court erred in allowing testimony concerning Petitioner's reputation for sexually inappropriate behavior,.....	43
Point of Error Number Seven.....	46
Article 37.071, Tex. Code Cr. Proc., as applied by Texas Courts, is unconstitutional because it does not provide for meaningful appellate review.....	46
Meaningfully review	48
Jury has unfettered discretion	52
Point of Error Number Eight.....	57
Applicable legal principles.....	57
Trial counsel's conduct was deficient.....	62
Counsel's deficient conduct was prejudicial in sentencing.....	92
This claim for relief is not procedurally barred.....	97
Relevant legal principles.....	98
The CCA's dismissal of this claim was not independent of federal law and does not preclude merits review by this Court.....	101
Point of Error Number Nine.....	104
<i>Atkins v. Virginia</i>	105
The Standard for Determining Mental Retardation.....	107
Ramiro Ibarra has mental retardation.....	111
Mr. Ibarra Has Significantly Subaverage Intellectual Functioning	111
Mr. Ibarra Has Deficits in Adaptive Functioning.....	113
Mr. Ibarra Exhibited Impairment Before the Age of 18.....	119
Mr. Ibarra was exposed to significant risk factors for mental retardation.....	120
Point of Error Number Ten.....	128
Point of Error Number Eleven.....	132
Introduction	132
The Violation of the Vienna Convention.....	133
Mexico Has Provided Crucial Assistance Since Learning of Mr. Ibarra's Detention.....	134
Prior Proceedings.....	137
The <i>Avena</i> Case in the International Court of Justice.....	137
The Supreme Court's First Grant of Certiorari in <i>Medellin</i>	138
The Determination by the President	139
The Supreme Court's Decision that Federal Habeas Adjudication was Premature in Mr. Medellin's Case.....	140
Mr. Ibarra's Subsequent Proceedings.....	140

Proceedings in the Texas Court of Criminal Appeals on <i>Medellin's</i> , <i>Avena</i> , and Presidential Determination Claims.	141
The Supreme Court's Second Grant of Certiorari in the <i>Medellin</i> Case.	142
Developments Since <i>Medellin</i>	144
Standard of Review.	147
Mr. Ibarra was Prejudiced by the Denial of His Vienna Convention Rights....	150
The Violation of the Vienna Convention Caused Mr. Ibarra Substantial Prejudice That Demands A New Trial.	150
Mr. Ibarra Did Not Know He Had a Right to Contact his Consulate for Assistance.	151
Mr. Ibarra Would Have Contacted The Mexican Consulate Had He Been Apprised of His Rights.	151
Mexico Would Have Provided Substantial Assistance to Mr. Ibarra....	152
Even under a Stricter Prejudice Standard, The Record in This Case Clearly Establishes Overwhelming Prejudice.	154
CONCLUSION AND PRAYER FOR RELIEF.	162
CERTIFICATE OF SERVICE.	163
VERIFICATION.	163

TABLE OF AUTHORITIES

United States Constitution

Article I, Section 9.....	19, 20, 42, 48, 49, 54
Eighth Amendment.....	40, 41, 44
Sixth Amendment.....	24, 35
Fourteenth Amendment.....	39

Supreme Court Cases

<i>Ake v. Oklahoma</i> , 470 U.S. 68 (1985).....	12, 19
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).....	15, 22, 28, 39, 40, 43, 47, 56, 59-61
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002).....	12, 14, 15, 19, 22, 24, 35, 39, 40, 43, 44, 59
<i>Barr v. City of Columbia</i> , 378 U.S. 146 (1964).....	12, 14, 15, 22, 24, 39, 40, 43, 44
<i>Breard v. Greene</i> , 523 U.S. 371 (1998).....	24, 35
<i>Caldwell v. Mississippi</i> , 472 U.S. 320 (1985).....	19, 20
<i>California v. Brown</i> , 479 U.S. 538 (1987).....	55
<i>Clark v. Allen</i> , 331 U.S. 503 (1947).....	149
<i>Cleburne v. Cleburne Living Center, Inc.</i> , 473 U.S. 432 (1985).....	110
<i>Clemons v. Mississippi</i> , 494 U.S. 738 (1990).....	50
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991).....	98, 99
<i>Collins v. Youngblood</i> , 497 U.S. 37 (1990).....	19
<i>Crane v. Kentucky</i> , 476 U.S. 683 (1986).....	129
<i>Delaware v. Prouse</i> , 440 U.S. 648 (1979).....	98
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982).....	60
<i>Florida v. Nixon</i> , 543 U.S. 175 (2004).....	90, 91
<i>Ford v. Georgia</i> , 498 U.S. 411 (1991).....	100
<i>Foster v. California</i> , 394 U.S. 440 (1969).....	35
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972).....	28, 42, 48, 50
<i>Gray v. Netherland</i> , 518 U.S. 152 (1996).....	148
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976).....	28, 42, 48, 49, 54, 59
<i>Harris v. Reed</i> , 489 U.S. 255 (1989).....	99
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941).....	148
<i>Idaho v. Wright</i> , 497 U.S. 805 (1990).....	40, 41, 44, 45
<i>Jackson v. Denno</i> , 378 U.S. 368 (1964).....	129
<i>James v. Kentucky</i> , 466 U.S. 341 (1984).....	100
<i>Johnson v. Mississippi</i> , 486 U.S. 578 (1988).....	100
<i>Jurek v. Texas</i> , 428 U.S. 262 (1976).....	48, 52
<i>Kolovrat v. Oregon</i> , 366 U.S. 187 (1961).....	149
<i>Lackey v. Texas</i> , 514 U.S. 1045 (1995).....	28
<i>Lee v. Kemna</i> , 534 U.S. 362 (2002).....	101
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978).....	60
<i>Medellin v. Dretke</i> , 543 U.S. 1032 (2004).....	137-139

<i>Medellin v. Texas</i> 552 U.S. ___, 128 S.Ct. 1346 (2008).....	141-145, 148
<i>Michigan v. Long</i> , 463 U.S. 1032 (1983)	98, 99
<i>Missouri ex rel. Southern R. Co. v. Mayfield</i> , 340 U.S. 1 (1950).....	99
<i>Neil v. Biggers</i> , 409 U.S. 188 (1972).....	36
<i>Parker v. Dugger</i> , 498 U.S. 308 (1991).....	52, 56, 57
<i>Penry v. Lynaugh</i> , 492 U.S. 302 (1989)	46, 105, 106, 108, 110
<i>Pulley v. Harris</i> , 465 U.S. 37 (1984).....	49, 50, 53
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002)	17, 128-130
<i>Roberts v. Louisiana</i> , 428 U.S. 325 (1976).....	55
<i>Rompilla v. Beard</i> , 545 U.S. 374 (2005).....	59, 66
<i>Sanchez-Llamas v. Oregon</i> , 584 U.S. 331 (2006).....	140, 145, 159
<i>Simmons v. United States</i> , 390 U.S. 377 (1968).....	35
<i>Skipper v. South Carolina</i> , 476 U.S. 1 (1986).....	60
<i>Smith v. Texas</i> , 550 U.S. ___, 127 S.Ct. 1686 (2007)	98
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	58, 69, 70, 92
<i>Tennard v. Dretke</i> , 542 U.S. 274 (2004).....	60
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968).....	30, 31
<i>Trest v. Cain</i> , 522 U.S. 87 (1997)	148
<i>Tuilaepa v. California</i> , 512 U.S. 567 (1994).....	56
<i>United States v. Lovasco</i> , 431 U.S. 783 (1977).....	25
<i>United States v. McDonald</i> , 456 U.S. 1 (1982).....	25
<i>United States v. Owens</i> , 484 U.S. 554 (1988)	38
<i>Walton v. Arizona</i> , 497 U.S. 639 (1990)	128
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003)	4, 58, 68-72, 89, 92, 97, 149, 155, 156
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000).....	69, 71, 72, 92, 133, 149
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976)	54, 60, 61
<i>Zant v. Stephens</i> , 462 U.S. 862 (1983)	55

Federal Cases

<i>Ainsworth v. Woodford</i> , 268 F.3d 868 (9 th Cir. 2001).....	94
<i>Anderson v. Sirmons</i> , 476 F.3d 1131 (10th Cir. 2007)	95
<i>Batchelor v. Cupp</i> , 693 F.2d 859 (9th Cir. 1982), cert. denied, 463 U.S. 1212 (1983)	149
<i>Battenfield v. Gibson</i> , 236 F.3d 1215 (10th Cir. 2001)	61, 73
<i>Brownlee v. Haley</i> , 306 F.3d 1043 (11th Cir. 2002)	93
<i>Caro v. Woodford</i> , 280 F.3d 1247 (9th Cir. 2002)	62
<i>Cave v. Singletary</i> , 971 F.2d 1513 (11th Cir. 1992)	66
<i>Collier v. Turpin</i> , 177 F.3d 1184 (11th Cir. 1999)	93
<i>Correll v. Ryan</i> , 465 F.3d 1006 (9th Cir. 2006)	68
<i>Davis v. Sec'y for the Dep't of Corrs.</i> , 341 F.3d 1310 (11th Cir. 2003)	148
<i>Deitz v. Money</i> , 391 F.3d 804 (6th Cir. 2004)	160
<i>Douglas v. Woodford</i> , 316 F.3d 1079 (9th Cir. 2003)	91, 93
<i>Frierson v. Woodford</i> , 463 F.3d 982 (9th Cir. 2006)	61

<i>Gosier v. Welborn</i> , 175 F.3d 504 (7 th Cir. 1999)	100
<i>Guerra v. Collins</i> , 916 F.Supp. 620 (S.D. Tex. 1995).....	153
<i>Guerra v. Johnson</i> , 90 F.3d 1075 (5th Cir. 1996)	153
<i>Hall v. Washington</i> , 106 F.3d 742 (7th Cir. 1997).....	66
<i>Hamblin v. Mitchell</i> , 354 F.3d 482 (6th Cir. 2003)	59, 95
<i>Harries v. Bell</i> , 417 F.3d 631 (6th Cir. 2005)	68
<i>Henderson v. Thieret</i> , 859 F.2d 492 (7th Cir. 1988)	149
<i>Hovey v. Ayers</i> , 458 F.3d 892 (9th Cir. 2006)	87
<i>Karis v. Calderon</i> , 283 F.3d 1117 (9th Cir. 2002).....	93
<i>Lambright v. Schriro</i> , 490 F.3d 1103 (9th Cir. 2007)	60, 63, 68
<i>Lewis v. Dretke</i> , 355 F.3d. 364 (5th Cir. 2003)	93, 157
<i>Marshall v. Cathel</i> , 428 F.3d 452 (3rd Cir. 2005).....	67, 91
<i>Martin v. Maxey</i> , 98 F.3d 844 (5 th Cir. 1996)	101
<i>Miller v. Dretke</i> , 420 F.3d 356 (5th Cir. 2005)	72
<i>Moore v. Gibson</i> , 195 F.3d 1152 (10th Cir. 1999)	148
<i>Murphy v. Netherland</i> , 116 F.3d 97 (4th Cir. 1997)	63, 160
<i>Osagiede v. United States</i> , 543 F.3d 399 (7 th Cir. Sept. 9, 2008)	160
<i>Outten v. Kearney</i> , 464 F.3d 401 (3rd Cir. 2006)	91
<i>Poindexter v. Mitchell</i> , 454 F.3d 564 (6th Cir. 2006)	63, 67
<i>Powell v. Collins</i> , 332 F.3d 376 (6 th Cir. 2003).....	94
<i>Pursell v. Horn</i> , 187 F. Supp. 2d 260 (W.D. Pa. 2002).....	93, 94
<i>Rosales v. Dretke</i> , 444 F.3d 703 (5 th Cir. 2006)	100
<i>Rubino v. Lynaugh</i> , 845 F.2d 1266 (5th Cir. 1988).....	19
<i>Ruiz v. Quarterman</i> , 504 F.3d 523 (5 th Cir. 2007).....	103, 104
<i>Smith v. Mullin</i> , 379 F.3d 919 (10th Cir. 2004).....	93
<i>Smith v. Stewart</i> , 189 F.3d 1004 (9th Cir. 1999)	87
<i>Soffar v. Dretke</i> , 368 F.3d 441, amended, 391 F.3d 703 (5th Cir. 2004)	73
<i>United States ex rel. Emerson v. Gramley</i> , 883 F. Supp. 225 (N.D. Ill. 1995)	61
<i>United States v. Chavez-Villarreal</i> , 3 F.3d 124 (5th Cir.1993).....	31
<i>United States v. Dortch</i> , 199 F.3d 193 (5th Cir.1999).....	31
<i>United States v. Kye Soo Lee</i> , 898 F.2d 1034 (5th Cir. 1990).....	30
<i>United States v. Martinez</i> , 588 F.2d 495 (5th Cir. 1971).....	40, 44
<i>United States v. Rangel Gonzalez</i> , 617 F.2d 529 (9 th Cir. 1980)	151, 154
<i>United States v. Rivas</i> , 157 F.3d 364 (5th Cir.1998).....	32
<i>White v. Roper</i> , 416 F.3d 728 (8th Cir. 2005)	72
<i>Williams v. Anderson</i> , 460 F.3d 789 (6th Cir. 2006)	73

State Cases

<i>Colella v. State</i> , 915 S.W.2d 834 (Tex. Cr. App. 1995)	47
<i>Commonwealth v. Alvarez</i> , 740 N.E.2d 610 (Mass. 2000)	97
<i>Ex parte Campbell</i> , 226 S.W.3d 418 (Tex. Crim. App. 2007)	102-104
<i>Ex parte Fierro</i> , 934 S.W.2d 370 (Tex. Crim. App. 1996).....	155

<i>Ex parte Gonzales</i> , 204 S.W.3d 391 (Tex. Crim. App. 2006).....	66, 97
<i>Ex parte Ibarra</i> , No. 48,832-01 (Tex. Crim. App. April 4 th , 2001).....	2-4, 101
<i>Ex parte Medellin</i> , 223 S.W.3d 315 (Tex. Crim. App. 2006).....	3, 141
<i>Gordon v. State</i> , 640 S.W.2d 743 (Tex. App. - San Antonio, 1982).....	20
<i>Ibarra v. State</i> , 11 S.W.3d 189 (Tex. Crim. App. 1999).....	1, 133, 148
<i>In re Lucas</i> , 94 P.3d 477 (Cal. 2004).....	62
<i>Keeton v. State</i> , 724 S.W.2d 58 (Tex. Cr. App. 1987).....	53
<i>Ledezma v. State</i> , 626 NW.2d 134 (Iowa 2001).....	153
<i>Marquez-Burrola v. State</i> , 157 P.3d 749 (Okla. Crim. App. 2007).....	64, 73, 92, 160, 161
<i>People v. Morgan</i> , 719 N.E.2d 681 (Ill. 1999).....	92
<i>State v. Moore</i> , 927 P.2d 1073 (OR 1996).....	54
<i>State v. Sullivan</i> , 596 So. 2d 177 (La. 1992), <i>rev'd on other grounds</i> , 508 U.S. 275 (1993).....	66
<i>Torres v. State</i> , 120 P.3d 1184 (Okla. Crim. App. 2005).....	64, 151-153, 155, 159
<i>Valdez v. State</i> , 46 P.3d 703 (Okla. Crim. App. 2002).....	63, 152, 153, 159
 Cert Petitions	
<i>Ibarra v. Texas</i> No. 99-8794.....	1, 3
 State Statutes	
Texas Code of Criminal Procedure, Article 18.01.....	19-21
Texas Code of Criminal Procedure, Article 18.02.....	19-21
Texas Code of Criminal Procedure, Article 37.071.....	46-48, 51
 Executive Declarations	
<i>Presidential Determination of February 28, 2005</i>	3, 139, 140, 142
 Proposed Legislation	
Avena Case Implementation Act of 2008 (H.R. 6481).....	145
 International Law Opinion	
<i>Case Concerning Avena and Other Mexican Nationals</i> (Mex. v. U.S.A.), 2004 I.C.J. 128 (Mar. 31, 2004).....	3, 132-134, 137-139, 141, 142, 144-146, 154, 161
 Treatises and Other Authorities	
American Association on Mental Retardation, <i>Mental Retardation: Definition, Classification, and Systems of Supports</i> 1 (10 th ed. 2002).....	108, 109, 111, 112, 120
American Association on Mental Retardation, <i>Mental Retardation: Definition, Classification, and Systems of Supports</i> 5 (9 th ed. 1992).....	107-111
American Psychiatric Association, <i>Diagnostic and Statistical Manual of Mental Disorders</i>	108, 110
Bright, <i>The Death Penalty As the Answer to Crime: Costly, Counterproductive and Corrupting</i> , 36 Santa Clara L. Rev. 1069, 1085-86 (1996).....	62

Fleischman, <i>Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in United States Death Penalty Cases</i> , 20 ARIZ. J. INT'L & COMP. L. 359, 365-74 (2003)	153
Goodpaster, <i>Effective Assistance of Counsel in Capital Cases</i> , 58 N.Y.U. L. Rev. 299 (1983)	62
Lyon, <i>Defending the Death Penalty Case: What Makes Death Different?</i> , 42 Mercer L. Rev. 695 (1991)	90
Wigmore, <i>Evidence</i> (J. Chadbourn rev. 1974)	41, 45